UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD R. VISSER, ROBERT HOSSFELD, MARIE HOSSFELD, and BEN JOHNSON, individually and as the representatives of a class of similarly situated persons, Plaintiffs, vs. CARIBBEAN CRUISE LINE, INC., CONSOLIDATED TRAVEL HOLDINGS GROUP, INC., DANIEL LAMBERT and ROBERT P. MITCHELL,[1] Defendants.	Case No.: 1:13-cv-01029-PLM-PJG

DEFENDANT CARIBBEAN CRUISE LINE, INC.'S MOTION TO MODIFY THE COURT'S ORDER OF FEBRUARY 26, 2016 [DKT. NO. 214]

Defendant Caribbean Cruise Line, Inc. ("CCL"), by and through undersigned counsel, files this Motion, pursuant to Federal Rule of Civil Procedure 60(b)(1), to Modify the Court's Order of February 26, 2016 [Dkt. No. 214] (the "Order") [2] by granting CCL's Motion to Compel Discovery from All Named Plaintiffs (the "Motion to Compel") [Dkt. No. 121] regarding the Internet-related discovery requests and entering the attached Proposed Order (the "Proposed Order"),[3] and in support thereof states the following:

INTRODUCTION

1. On October 21, 2015, Defendant CCL filed its Motion to Compel.[4] Among other

[1] Robert Mitchell was dismissed pursuant to Court Order based upon the Court's determination that it does not have personal jurisdiction over Mitchell. [Dkt. No. 21].
[2] Ex. A.
[3] Ex. B.
[4] *See* Dkt. No. 121.

things, the Motion to Compel sought various Internet-related and other electronic information.[5]

2. As recounted in the Order,[6] after several conferences and submissions of proposed orders, the Court ultimately ruled that CCL was entitled to the requested information, subject to certain search protocols, the identification of the third party to be used in the searches on Plaintiffs' electronic devices, and a reporting procedure that addressed Plaintiff Donald Visser's concerns that potentially responsive documents located on his computer, which he uses in connection with his law practice, may contain privileged information. At the conference before the Court on September 16, 2015, the Court directed CCL to file an order "consistent with the rulings of the court."[7]

3. Although CCL engaged in efforts to identify a third party vendor, obtain Plaintiffs' approval of that vendor, and draft the directed proposed order, as a result of an unintentional oversight, CCL never submitted the Proposed Order. Solely on that basis, the Court denied the branch of CCL's Motion to Compel regarding the "internet-related discovery requests."[8]

4. While Plaintiffs prefer not to "revisit this issue," CCL's innocent omission to act should not preclude the discovery the Court previously found was appropriate and justified. For the following reasons, the Court should, pursuant to Federal Rule of Civil Procedure 60(b), modify its Order to grant CCL's Motion to Compel regarding the Internet-related discovery requests and to enter the attached Proposed Order.[9]

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[5] *See, e.g.*, *id.* at 13-14.
[6] Ex. A at 1-2.
[7] Dkt. No. 165.
[8] Ex. A at 3.
[9] Ex. B.

STATEMENT OF FACTS

5. Immediately following the conference before the Court on September 16, 2015, counsel for CCL endeavored to locate a third-party vendor to apply the search protocols to Plaintiffs' electronic devices.[10]

6. Two days later, on September 18, 2015, counsel for CCL e-mailed counsel for Plaintiffs to identify D4, LLC as the third party vendor CCL proposed to use for the inspection of Plaintiffs' devices.[11] So that counsel for Plaintiffs could make an informed decision, the e-mail attached information about D4, LLC's forensics and collections work and the curriculum vitae of the employees who would potentially be working on the matter.[12]

7. On September 21, 2015, counsel for Plaintiffs responded, "I am in the review process in regards to D4. I will get back to you as soon as I have completed my review."[13]

8. The review lasted almost three weeks, until October 8, 2015, when, following an inquiry from counsel for CCL,[14] counsel for Plaintiffs advised that certain employees from D4, LLC "are acceptable to Plaintiffs."[15]

9. At that time, counsel for CCL was attending to the drafting of CCL's response to Plaintiff Donald Visser's Motion for Class Certification, which was filed on October 12, 2015[16]; the Motion to Stay, which was filed on October 23, 2015[17]; Defendant Daniel Lambert's Motion to Dismiss, which was filed on October 29, 2015,[18] and the reply in support thereof and the

[10] Declaration of Jeffrey A. Backman at ¶ 2.
[11] Ex. C.
[12] *See id.*
[13] Ex. D.
[14] Ex. E.
[15] Ex. F; Backman Decl. at ¶ 3.
[16] Dkt. No. 178.
[17] Dkt. No. 181.
[18] Dkt. No. 183.

motion to strike portions of Plaintiffs' response, which were both filed on December 28, 2015.[19,20]

10. In the midst of those proceedings, and counsel's other representations, counsel for CCL regretfully and inadvertently overlooked that it had yet to file the proposed order directed to be filed by the Court regarding the Internet-related discovery requests.[21]

11. Immediately upon receipt of the Court's Order, counsel for CCL investigated and realized its oversight.[22] Two days later, on Sunday, February 28, 2016, counsel for CCL e-mailed counsel for Plaintiffs a copy of the Proposed Order that had been prepared in October 2015 and noted it had inadvertently never sent for review or submitted to the Court.[23]

12. On Tuesday, March 1, 2016, counsel for Plaintiffs responded. Without disputing that the Proposed Order accurately reflects the Court's rulings, counsel for Plaintiff stated, "I spoke with my clients following receipt of your email and I do not have the latitude to revisit this issue."[24]

ARGUMENT

13. Federal Rule of Civil Procedure 60(b)(1) provides that a "court may relieve a party . . . from a final judgment, order, or proceeding for," among other reasons, "mistake, inadvertence, surprise, or excusable neglect . . . ." A motion under Rule 60(b)(1) "must be made within a reasonable time," and "no more than a year after the entry of the judgment or order"

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[19] Dkt. Nos. 207 & 208.
[20] Backman Decl. at ¶ 4.
[21] *Id.* at ¶ 5.
[22] *Id.* at ¶ 6.
[23] Ex. G. The proposed order sent to counsel for Plaintiffs is identical to the one submitted at Exhibit B with the sole exception of the month and year appearing on the signature page.
[24] Ex. H.

sought to be modified.[25]

14. Rule 60(b)(1) encompasses relief for "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness."[26] Whether a party's mistake, inadvertence, surprise, or neglect is excusable "involves an equitable determination that takes into account (1) the danger of prejudice to the other party, (2) the length of delay, (3) its potential impact on judicial proceedings, (4) the reason for the delay, and (5) whether the movant acted in good faith."[27] These factors represent a liberalization of what constitutes excusable neglect, which the Supreme Court "determined in *Pioneer* . . . is an equitable principle and that, in determining whether a party should be granted a reprieve, a court should consider 'all relevant circumstances surrounding the party's omission . . . .'"[28] All of these factors weigh in favor of granting CCL's motion to modify the Order.

15. Plaintiffs will not suffer any prejudice from the requested modification of the Court's Order. The requested modification will not result in any adverse impact, and simply seeks to instate the rulings the Court made at the September 16, 2015 conference.

16. The second factor, the length of the delay, has a somewhat attenuated application here because there was no express deadline. Nonetheless, CCL inadvertently failed to submit a proposed order reflecting the Court's rulings. The earliest it could have done so was on October 8, 2015, when Plaintiffs advised they approved the engagement of certain employees of the identified third-party discovery vendor to be used in connection with the Internet-related discovery requests.

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[25] Fed. R. Civ. P. 60(c).
[26] *Pioneer Invest. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993).
[27] *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001) (citing *Pioneer*, 507 U.S. at 388).
[28] *Spitzer Great Lakes, Co. v. United States E.P.A.*, 173 F.3d 412, 416-17 (6th Cir. 1999). (quoting *Pioneer*, 507 U.S. at 395).

17. The non-filing of the Proposed Order until now has had no adverse impact on this action. Since October 8, 2015, the parties have engaged in motion practice on a number of issues, none of which were affected by the disposition of CCL's Motion to Compel. Moreover, the non-filing of the Proposed Order does not affect Plaintiffs' continuing duty to preserve the requested information.

18. CCL's oversight was inadvertent and was certainly not made in bad faith – there was no benefit to CCL from failing to submit the Proposed Order. Nor did CCL ignore or disregard warnings. Rather, as a result of the extended period of time that the third-party discovery vendor was being vetted, and in the midst of significant motion practice in this action and proceedings in other actions, counsel for CCL inadvertently overlooked that the submission of the Proposed Order regarding the Internet-related discovery requests remained outstanding.[29]

19. CCL has acted in good faith to rectify its oversight. Immediately upon receipt of the Court's Order and learning of the problem, counsel for CCL contacted counsel for Plaintiff, explained the situation, and provided a copy of the Proposed Order to obtain Plaintiff's confirmation that it accurately reflected the Court's rulings at the September 16, 2015

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[29] *Cf. Union Pac. R. Co. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 783 (8th Cir. 2001) (reversing denial of motion to vacate default judgment where defendant's "negligence involved only a minor mistake" and "as soon as [it] had notice of the default judgment against it, it entered into negotiations with Union Pacific in an effort to have the default judgment set aside. When that failed, Progress Rail filed its motion to set the judgment aside, only three weeks after it had notice of the default . . . ."); *Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999) (vacating order dismissing complaint for failure to respond to motion to dismiss because the failure to record the applicable deadline was an "innocent oversight" that was not done in bad faith); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (reversing district court's rejection of untimely motion where "[t]he reason for the delayed filing was a failure in communication between the associate attorney and the lead counsel. . . . . There is no indication that counsel deliberately disregarded Local Rule 8.06. Anchor Glass has not argued that Cheney intended to delay the trial, or that he sought an advantage by filing late. The nonfiling was simply an innocent oversight by counsel. We find no bad faith that would warrant forfeiture of Cheney's right to a full trial of his cause.").

conference. Plaintiffs do not dispute the accuracy of the Proposed Order. They simply prefer not to "revisit this issue" that will subject them to discovery previously directed by the Court.[30]

20. CCL's minor oversight that has not prejudiced Plaintiffs in the slightest, and which CCL is diligently attempting to rectify, should not deprive CCL of the discovery the Court found was appropriate and justified. Accordingly, Defendant Caribbean Cruise Line, Inc. requests that the Court, in the exercise of its discretion, modify its Order of February 26, 2016 [Dkt. No. 214] by granting CCL's Motion to Compel [Dkt. No. 121] regarding the internet-related discovery requests, enter the attached Proposed Order, and order such further relief as this Court deems just and proper.

DATED: March_1, 2016

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[30] Ex. H.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 1, 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of Court by using CM/ECF which will serve copies to all counsel of record registered to receive CM/ECF notification, and that it was served upon any other counsel and parties in some other authorized manner.

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